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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 370

petition not printed

FRANK EGAN,	*Petitioner,*
VS.	
STATE OF CALIFORNIA,	*Respondent.*

RESPONDENT'S ANSWER TO APPLICATION FOR WRIT OF CERTIORARI.

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RESPONDENT'S ANSWER TO APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT OF PROCEEDINGS.

On June 6, 1932, petitioner, Frank Egan, who was the Public Defender of the City and County of San Francisco, Albert Tinnin and Verne Doran were indicted for the murder of Mrs. Jessie Scott Hughes.

A separate trial was granted Doran, who turned state's evidence as a witness against Egan and Tinnin at their trial, both of whom were convicted by a jury for murder in the first degree and on September 14, 1932, were sentenced to life imprisonment. Motions for a new trial were denied and separate notices of appeal were taken by Egan and Tinnin. Tinnin completed his appeal which resulted in the affirmance of the judgment. (*People v. Tinnin,* 136 Cal. App. 301, 28 Pac. (2d) 951.) Egan failed to perfect his appeal by his neglect to file an application for the record within the time prescribed by law, and on November 28, 1933 his appeal was dismissed on motion of the Attorney General. (*People v. Egan,* 135 Cal. App. 479, 27 Pac. (2d) 412.)

On September 15, 1938, Egan filed a petition for a writ of habeas corpus in the State Supreme Court, which was denied.

On February 2, 1942, a second petition for a writ of habeas corpus was filed in said State Supreme Court by Egan on behalf of himself and Albert Tinnin. Writs of habeas corpus were issued and a reference granted to take testimony before a referee on the following factual issues:

1. Did any witness who testified against Frank Egan or Albert Tinnin in the trial which led to their convictions on the charges for which they are now deprived of their liberty commit perjury as defined in section 118, *Penal Code;* that is, did such witness testify to any material matter which he knew to be false?

2. In the event that such witness or witnesses did commit perjury, as so defined, did the representative of the State of California, the District Attorney, or any of his deputies or assistants, cause or suffer such testimony to be introduced, knowing that such testimony as given was perjured?

3. Was the petitioner, Frank Egan, unlawfully deprived of the assistance of counsel for his defense during the trial which led to his conviction on the charge for which he is now deprived of his liberty?

In due course Judge Butler of Marin County was appointed as Referee by the State Supreme Court and testimony was taken before him on said issues of fact and his findings and report were filed with said Supreme Court as directed, which were adverse to both Egan and Tinnin. Thereafter exceptions were filed by Egan and Tinnin to the findings and report of the referee with said Court and argued and submitted on briefs, and on June 5, 1944, said Supreme Court rendered its opinion and decision against said parties, holding the proof insufficient to establish the affirmative of any of said issues, upon which said writs were discharged and petitioners remanded to custody. (*In re Egan,* 24 Cal. (2d) 323, 149 Pac. (2d) 693.) Thereafter from this decision, a petition on certiorari was filed by Egan with the United States Supreme Court which was denied by said Court December 4, 1944. (*Egan v. California,* 65 S. Ct. Rep. 272.)

On September 5, 1945, the instant proceedings were filed in the Superior Court of the State of California,

in and for the City and County of San Francisco, which constituted a motion to set aside the indictment returned against Egan by the Grand Jury on June 6, 1932, and a motion to annul, vacate and set aside the judgment of conviction in the trial of said case. The motions were argued and submitted and denied by said Superior Court upon the ground they were not seasonably made. Separate notices of appeal were filed from the order denying said motions in the District Court of Appeal of the State of California, First District, Second Division. Briefs were filed by the parties on said appeal which were argued and submitted for decision and which resulted in the affirmance of the trial Court's order. (*People v. Egan*, 73 A.C.A. 996, 167 Pac. (2d) 766, where a fuller statement of the facts appear, a copy of which is set out in the Appendix for the convenience of the Court.) A petition for a hearing was filed in the State Supreme Court which was denied. It is conceded by petitioner that the motion to vacate the judgment is in the nature of a petition for a writ of error *coram nobis.*

We shall not here again consider the law and the conclusions upon which the opinion and decision of the District Court of Appeal is based. This Court is referred to said opinion for the points and authorities therein cited and decided. It clearly shows that under the facts and the local law applied, the remedies sought by petitioner were not available to him and that both of said motions were not timely or seasonably made. They were made after a period of thirteen

years from the entry of the judgment when both the prosecutor and the trial judge were deceased.

We are not here concerned with whether petitioner had any other remedy in the state courts which he might pursue. As indicated, the opinion and decision holds only that the remedies sought were not open to petitioner.

THE PROCEEDING ON CERTIORARI HEREIN IS NOT BASED UPON A JUDGMENT OF THE HIGHEST STATE COURT.

At the outset we desire to direct attention to the fact that Egan having failed to perfect his appeal from the judgment, it was dismissed on motion of the Attorney General. Hence, there was no judgment on the merits by the State Supreme Court, and the remedy sought, that is the motion to vacate the judgment, can not be substituted for an appeal.

People v. Egan, 73 A.C.A. 996, 167 Pac. (2d) 766.

Hence, a judgment on the merits from the highest state Court is not presented for review, under which circumstances this Court may not assume jurisdiction.

Newman v. Gates, 204 U. S. 89, 51 L. Ed. 385.

ISSUES RAISED BY PETITIONER.

The petition is unduly lengthy, needlessly repetitious and somewhat confusing. However, we gather two general propositions from the questions presented,

which it is urged by petitioner give this Court jurisdiction. First, that the indictment under which petitioner was prosecuted and convicted is void, and that since the indictment is void it carried with it the validity of the judgment. Second, that a confession was secured from ~~petitioner~~ Doran through coercion and promise of immunity. We shall consider these two issues to determine whether they involve a substantial federal question and whether the decision and the opinion of the District Court of Appeal is necessarily based upon a substantial federal question or questions, in the succeeding section of this answer.

RESPONDENT'S CONTENTIONS.

A. THAT THE PETITION PRESENTS NO SUBSTANTIAL FEDERAL QUESTION SUFFICIENT TO WARRANT THIS COURT IN ASSUMING JURISDICTION.

B. THAT THE OPINION AND DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST DISTRICT, SECOND DIVISION (HEARING DENIED BY THE STATE SUPREME COURT), WAS ADEQUATELY DECIDED UPON A NON-FEDERAL QUESTION.

(a) To warrant this Court in assuming jurisdiction, a substantial federal question must be presented by the petition.

Honeyman v. Hanan, 300 U. S. 14, 18 (81 L. Ed. 476);

Gaines v. State of Washington, 277 U. S. 81, 87 (72 L. Ed. 793);

Whitney v. California, 274 U. S. 357, 360 (71 L. Ed. 1095);

Zucht v. King, 260 U. S. 174 (67 L. Ed. 194);

Sugarman v. U. S., 249 U. S. 182, 184 (63 L. Ed. 550).

A number of the statements made in the petition are gratuitous or overdrawn, which can find no support in the record. Indeed, as far as we are able to discover, the record of the trial of the case has not been made a part of this proceeding in this Court. The petition contains certain extracts from the record which are obviously insufficient for consideration by this Court.

At the outset the petition sets forth some nineteen questions, termed "Questions Involved" for the consideration of this Court upon the theory they involve a federal question. Their examination will disclose they simply involve local law and rules of procedure applied as indicated by the opinion and decision of the District Court of Appeal pursuant to established precedent, such as the credibility of the witness Doran before the grand jury; the question of the sufficiency of his testimony to warrant the issuance of the indictment on the ground of no corroboration, required as alleged by section 1111, *Penal Code,* being an accomplice; the procuring of the indictment by the use of leading questions, conflicting evidence and laches, which are matters of local concern and do not present a federal question.

Herndon v. Georgia, 295 U. S. 441, 443, 79 L. Ed. 1530;

Newman v. Gates, 204 U. S. 89, 51 L. Ed. 385;

Jacobi v. Alabama, 187 U. S. 133, 47 L. Ed. 106;

O'Neil v. Vermont, 144 U. S. 323, 36 L. Ed. 450;

Thorington v. Montgomery, 147 U. S. 490, 37 L. Ed. 252;

McNulty v. California, 149 U. S. 645, 37 L. Ed. 882.

We do not wish to needlessly consume the time of this Court in exploiting what appears to be the obvious, since the foregoing are plainly matters of local concern which do not involve due process. However, we may be permitted to further discuss the subject of the indictment under the law of the State of California. The indictment is merely a formal written accusation and not a trial of the cause and is not governed by the strict rules of evidence and procedure of our courts of law. They will not inquire into the sufficiency of the evidence in support of the indictment where there is some evidence introduced in support of it, sufficient only to show reasonable and probable cause, and the testimony of an accomplice need not be corroborated before it.

Greenberg v. Superior Court, 19 Cal. (2d) 319, 321, 322, 121 Pac. (2d) 713.

Even at the trial of an accused the question as to whether the testimony of an accomplice has been corroborated and the appraisal of conflicting evidence are matters solely for the state courts to decide, they do not present a federal question.

Lisenba v. California, 314 U. S. 219, 227, 86 L. Ed. 166.

Neither the competency of the evidence before the grand jury (*People v. Best,* 13 Cal. App. (2d) 606, 611, 57 Pac. (2d) 168), nor whether the testimony was secured by leading questions, are of any materiality. (*Morehouse v. Superior Court,* 124 Cal. App. 38, 12 Pac. (2d) 133.)

While a grand jury is an arm of the Court endowed with judicial functions, it does not constitute a trial

court; it is not hedged in with technical rules of evidence and procedure which guide courts of law. It is sufficient that the evidence taken before a grand jury shows reasonable or probable cause.

Greenberg v. Superior Court, 19 Cal. (2d) 319, 121 Pac. (2d) 713;

People v. Novell, 54 Cal. App. (2d) 621, 129 Pac. (2d) 453.

As to the second proposition, petitioner contended that his conviction was based largely, if not entirely, on a coercive confession of Doran, his accomplice, and that it was secured through a promise of immunity, two irreconcilable positions. We concede that if petitioner was convicted on a coercive extra-judicial confession, a federal question would be presented and that a resort to the record may be had to determine its substantiality, but our unqualified reply is that no confession of Doran was introduced into the record and, hence, could play no part in the conviction of petitioner. Doran appeared at the trial as a witness and testified voluntarily under oath before the Court and under its protection, implicating Egan.

Nor did Doran testify under a promise of immunity; while it is true a promise was made by the prosecution to appear in his behalf and plead for clemency before the trial judge upon Doran's promise to testify to the truth at the trial of the case against Egan and Tinnin, the matter of clemency was left, of course, to the discretion of the trial judge. There is no claim that any such promise was made by the trial judge, and the fact that upon such plea the trial

judge in recognition of Doran's services to the State permitted him to withdraw his plea of not guilty to the murder charge and enter a plea to a charge of manslaughter, does not support the charge of a promise of immunity for Doran's confession. It is recognized by this Court that where an accomplice turns state's evidence, under such circumstances there is no denial of due process.

Lisenba v. California, 314 U. S. 219 (86 L. Ed. 166), at page 227:

> "*The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice.* There is no adequate showing that there was a corrupt bargain with Hope, *and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate.* Hope's affidavits not only were prepared after the State Supreme Court had passed upon the case and its opinion had been published but after the lapse of nearly three years from the trial. They could, therefore, be considered only in the *habeas corpus* case. The State contends that it had no opportunity to answer them. This is contested by the petitioner. In any event, it was stipulated that the record on appeal in the other case should be part of the record on the *habeas corpus* hearing; and comparison of the testimony at the trial with the allegations of the affidavits raises serious doubts as to their truthfulness. *The appraisal of the conflicting evidence was for the court below. Even if its refusal to believe Hope's depositions were erroneous, the*

error would be no more a denial of due process than was its approval, on appeal, of the trial judge's refusal to direct a verdict on the ground of insufficiency of evidence." (Italics ours.)

Indeed, if a federal question is presented under the above circumstances it is merely formal and wholly devoid of merit to the extent that it is frivolous and it will receive no consideration from this Court.

Berkman v. U. S., 250 U. S. 114, 118 (63 L. Ed. 877);

Hendricks v. U. S., 223 U. S. 178, 184 (56 L. Ed. 394);

Brolan v. U. S., 236 U. S. 216 (59 L. Ed. 544);

Sugarman v. U. S., 249 U. S. 182, 184 (63 L. Ed. 550).

(b) To give this Court jurisdiction it must appear affirmatively not only that a federal question was presented for decision, but that its decision was necessary to a determination of the cause, and that it was actually decided, or that the judgment could not have been rendered without deciding it.

Honeyman v. Hanan, 300 U. S. 14 (81 L. Ed. 476), at page 18:

"Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. Lynch v. New York ex rel. Pierson, 293 U. S. 52, 54, and cases there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine

whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record."

Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066;

Lynch v. New York, 293 U. S. 52, 54, 79 L. Ed. 191.

A review of the opinion and the decision of the District Court of Appeal will show that the appeal was decided upon the propositions that the remedies sought by petitioner in the Superior Court were not open to him and that they were not seasonably made, neither of which involves a federal question, and the opinion and decision rested upon an adequate non-federal question.

It is submitted the petition contains no merit and should be dismissed, and this answer may be deemed a motion for the dismissal of the same.

Dated, San Francisco, California,
September 4, 1946.

Respectfully submitted,

ROBERT W. KENNY,
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DAVID K. LENER,
Deputy Attorney General of the State of California,
Of Counsel.

(Appendix Follows.)

Appendix

(Vol. 73 A.C.A. 996.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Criminal No. 2392

The People of the State of California,
Plaintiff and Respondent,
vs.
Frank Egan,
Defendant and Appellant.

OPINION

On June 6, 1932, Frank Egan, who was then public defender of the city and county of San Francisco, was indicted jointly with Albert Tinnin and Verne Doran for the murder on April 29, 1932, of Mrs. Jessie Scott Hughes. Upon their demand for separate trials a severance was granted as to Doran but denied as to the other two defendants. At the time of arraignment and before entry of plea defendants Egan and Tinnin moved to set aside the indictment but the motion was denied. Doran confessed to the murder,

turned State's evidence, and subsequent to the conviction of Egan and Tinnin pleaded guilty to manslaughter; he was sentenced to San Quentin for the time prescribed by law and was released on parole in November of 1934. As a result of Doran's testimony, together with other evidence connecting them with the crime, Egan and Tinnin were found guilty of first degree murder and on September 14, 1932, were sentenced to life imprisonment. After denial of their motions for new trial each defendant filed a separate notice of appeal. Tinnin completed his appeal and the judgment against him was affirmed in *People v. Tinnin,* 136 Cal.App. 301 [28 P.2d 951], wherein a full statement of the facts is recited. Egan failed to perfect his appeal within the time prescribed by law and on November 28, 1933, upon motion of the attorney general, the appeal was dismissed. (*People v. Egan,* 135 Cal.App. 479 [27 P.2d 412].)

A petition by Egan for a writ of habeas corpus was denied by the state Supreme Court on September 15, 1938. On February 2, 1942, Frank Egan, on behalf of himself and Albert Tinnin, filed a second petition for a writ of habeas corpus with the same court. The writs were issued and Judge Edward I. Butler of Marin County was appointed as referee to hear testimony on the questions of whether any witness at the original trial committed perjury, whether, in the event that perjury was committed, the prosecution permitted any testimony to be introduced knowing that it was perjured and, finally, whether Frank Egan was deprived of counsel during the trial. After numerous

hearings Judge Butler filed his findings and report with the Supreme Court, adverse to Egan and Tinnin. Exceptions to the report were filed by the petitioners and the matter was argued and submitted. On June 5, 1944, the court rendered its decision against the parties, discharging the writs and remanding petitioners to custody. (*In re Egan*, 24 Cal.2d 323 [149 P.2d 693].) A petition for writ of certiorari was denied by the United States Supreme Court on December 4, 1944. (*Egan v. California*, —— U.S. —— [65 S.Ct. 272, —— L.Ed. ——].)

On September 5, 1945, the instant proceedings were commenced by the filing of a motion to set aside the indictment as to defendant Frank Egan and a motion to annul, vacate and set aside the judgment of conviction of defendant Frank Egan, together with supporting affidavits. The former motion was based upon seventeen grounds to the general effect that the indictment was obtained on incompetent, improper and insufficient evidence. The motion to set aside the judgment was based upon forty-one grounds wherein it was alleged principally that the judgment was secured by perjured testimony with the connivance of the prosecution. These motions were argued in the court below and upon submission the court made an order denying each motion on the ground that it had been untimely made. Separate notices of appeal were filed from the order denying the motion to set aside the indictment and from the order denying the motion to set aside the judgment.

In support of his appeal from the order denying the motion to set aside the indictment the appellant has presented a lengthy and repetitious argument in an attempt to show that the indictment based upon the testimony of Doran was void and should be dismissed. Such an argument cannot be considered at this late date either by the trial court or by this court on appeal. The records indicate that upon arraignment and before entry of plea Egan and Tinnin made a motion to set aside the indictment. The law is well settled that such a motion under section 995 of the Penal Code must be made in the court in which the accused is arraigned before demurrer or plea and that a failure to so move at that time constitutes a waiver of any future objections. (Pen. Code, § 996; *People v. Kellogg,* 6 Cal.2d 448, 454 [57 P.2d 1305]; *People v. Harris,* 219 Cal. 727, 730 [28 P.2d 906]; *People v. Stacey,* 34 Cal. 307, 308; *People v. Linton,* 102 Cal.App. 608, 611 [283 P. 389].)

Upon denial of the motion made on arraignment the appropriate remedy of the accused would be the filing of a petition for a writ of prohibition to restrain the lower court from proceeding with the trial. (*Greenberg v. Superior Court,* 19 Cal.2d 319, 323 [121 P.2d 713].) The motion involved in the instant appeal was not made until thirteen years after the entry of judgment at the time when this remedy was not available to the appellant. The trial court would not be permitted to entertain a motion to set aside a final judgment on the ground of insufficiency of the indictment (*People v. Wallington,* 77 Cal.App. 366 [246 P. 815])

and it was correct in holding that the indictment could not be set aside subsequent to the entry of the judgment.

However, even if the motion to set aside the indictment had been made at a seasonable time an appeal would not lie directly from the order denying the motion. (Pen. Code, § 1237; *People v. Simmons,* 119 Cal. 1, 2 [50 P. 844]; *People v. Wilde,* 42 Cal.App.2d 482, 485 [109 P.2d 415]; *People v. Izlar,* 8 Cal.App. 600, 602 [97 P. 685].) The order would be reviewable only on appeal from the judgment itself. (*People v. Duncan,* 50 Cal.App.2d 184, 188 [122 P.2d 587].) Hence the attempted appeal from the order denying the motion to set aside the indictment must be dismissed. (*People v. Calkins,* 8 Cal.App.2d 251, 253 [47 P.2d 544].)

On his appeal from the order denying the motion to set aside the judgment the appellant attempts to argue the case on its merits as though it were an original appeal from the judgment. The main contentions on this appeal seem to be that Egan was convicted upon the perjured testimony of Verne Doran and that he was deprived of counsel during the trial. The identical issues were before the Supreme Court in the previous habeas corpus proceeding. As stated above, testimony was taken on these issues and the report of the referee, excepted to by appellant, was argued and submitted. In its decision (*In re Egan, supra*) the court stated at page 335: "On such a record there is no basis whatsoever for a tenable con-

clusion that the petitioners or either of them were convicted on testimony as to any material matter which was false, or that the prosecuting officials or any other representatives of the State suffered the introduction of false testimony knowing it to be false." It was also held in that proceeding that Egan was not deprived of the service of counsel, the court stating at page 339: "Finally, the petitioners are making a collateral attack on judgments rendered ten years before this particular proceeding was initiated. The burden was upon them to show that they were deprived of some constitutional right. Neither has established such a deprivation on the basis of alleged false testimony given at the trial, and neither has proved that he was deprived of the assistance of counsel in a substantial sense. (*Johnson v. Zerbst,* 304 U.S. 458, 468 [58 S.Ct. 1019, 82 L.Ed. 1461].) The court therefore would not be justified in declaring the judgments void." Hence the grounds of the motion and the issues argued on this appeal are identical with the issues finally adjudicated in the prior habeas corpus proceedings between the same parties. The prior judgment must be held, therefore, to operate as an "estoppel or conclusive adjudication" on those issues. (*Sutphin v. Speik,* 15 Cal.2d 195, 201 and 202 [99 P.2d 652, 101 P.2d 497]; *In re Stratton,* 133 Cal. App. 738, 740 [24 P.2d 832].)

Further, the motion herein to set aside the final judgment of conviction, having been made after a new trial was denied and after the time for granting a new trial had expired, was in the nature of an ap-

plication for a writ of error *coram nobis* at common law. (*People v. Mooney,* 178 Cal. 525, 528 [174 P. 325]; *People v. Butterfield,* 37 Cal.App.2d 140, 142 [99 P.2d 310]; *People v. Kretchmar,* 23 Cal.App.2d 19, 22 [72 P.2d 243], and authorities cited therein. "The writ of error coram nobis is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court." (1 Freeman on Judgments, 5th ed., § 256; *People v. Gilbert,* 25 Cal.2d 422, 442 [154 P.2d 657]; *People v. Mooney, supra,* 528.) It is well settled that the writ may not be used to cure irregularities occurring at the trial except in such circumstances of extrinsic fraud which actually deprived the petitioner of a trial on the merits. (*People v. Schwarz,* 201 Cal. 309, 314 and 315 [257 P. 71]; *People v. Reid,* 195 Cal. 249, 258 [232 P. 457, 36 A.L.R. 1435]; *People v. Mooney, supra,* 529; *People v. Lewis,* 64 Cal.App.2d 564, 565 [149 P.2d 27]; *People v. Deutsch,* 16 Cal.App.2d 121, 122 [60 P.2d 155].)

In view of the narrow limits placed on the application of the writ it seems that appellant, in arguing the merits of his case, has misconceived the scope of the remedy attempted to be invoked. The authorities cited above are unanimous in holding that the writ of *coram nobis* cannot be utilized to set aside a judgment in a case in which the defendant was given a full trial

on the merits. Appellant's contentions relative to a deprivation of counsel and the verity of the testimony at his trial cannot be here considered. In connection with the latter argument the court in the Mooney case held in a similar situation at pages 529 and 530: " 'In the trial of the case of Thomas J. Mooney the truth or falsity of the testimony of the witnesses, Oxman and Edeau, was a part of the issue submitted to the jury, and that issue, upon the return of the verdict, became an adjudicated issue of fact which cannot now by the writ of *coram nobis* be readjudicated. The remedy in such case is by motion for a new trial, and if newly discovered evidence is too late in its production, its consideration cannot be brought about under the guise of a motion to vacate the judgment upon the ground of fraud. The defendant in such case is without remedy.

" 'In this state it is the settled law that a judgment cannot be set aside because it is predicated upon perjured testimony or because material evidence is concealed or suppressed. The fraud which is practiced in such cases upon both the court and him against whom the judgment is pronounced is not such fraud as is extrinsic to the record; and it is only in cases of extrinsic fraud that such relief may be had. (*Pico v. Cohn,* 91 Cal. 134 [25 Am.St. Rep. 159, 13 L.R.A. 336, 25 P. 790, 27 P. 537]; *In re Griffith,* 84 Cal. 112 [23 P. 528, 24 P. 381]; *Allen v. Currey,* 41 Cal. 321.)' "

There is another reason why the remedy sought by the appellant in this proceeding was not available to

him. The records show that Egan made a motion for a new trial and that he filed a notice of appeal which he failed to perfect. The authorities are unanimous in holding that where remedies exist by statute which were not available at common law, the right to make a motion for a new trial and to appeal, the writ of *coram nobis* cannot be entertained. (*People v. Reid, supra*, 255 and 256; *People v. Davis*, 187 Cal. 750, 751 [203 P. 990]; *People v. Mooney, supra*, 529.)

Finally, in this case the judgment of conviction was entered on September 14, 1932, and the within motion to vacate that judgment was not filed until September 5, 1945, approximately thirteen years later. Upon this showing the lower court denied the motion on the ground that it was untimely made. The courts of this state require that a showing of diligence be made in the application for a writ of error *coram nobis*. (27 Cal.L.Rev. 232.) It was held in *People v. Black*, 114 Cal.App. 468, 473 [300 P. 43], that the writ should be applied for at or near the time of moving for a new trial, and in *People v. Vernon*, 9 Cal. App.2d 138, 142 [49 P.2d 326], that the application must be "within a reasonable time" after the entry of judgment. In applying these rules the courts have held that six years and eight months was an untimely delay (*People v. Lumbley*, 8 Cal.2d 752, 761 [68 P.2d 354]), that a six and one-half years' delay was unreasonable (*People v. Lewis, supra*), that six years was too long a period (*Vernon v. Rappaport*, 25 Cal.App.2d 281 [77 P.2d 257]), and that a delay of five years was unreasonable (*People v. Harincar*, 49 Cal.App.2d 594,

596 [121 P.2d 751]). In view of these authorities, all of which involved a considerably shorter period of delay than was shown to exist in the present litigation, the lower court had no alternative but to deny the motion on the ground that it was not seasonably made.

The appeal from the order denying the motion to set aside the indictment is dismissed. The order denying the motion to annul, vacate and set aside the judgment of conviction is affirmed.

Nourse, P. J.

Goodell, J., and Dooling, J., concurred.

Filed April 10, 1946.

Walter S. Chisholm, Clerk.